No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL., RESPONDENTS.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, DELAWARE, HAWAII, IDAHO, IOWA, MAINE, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN
Solicitor General
NADINE J. WICHERN*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2088

Of Counsel:
DAN SCHWEITZER
750 First Street, N.E.
Suite 1100
Washington, D.C. 20002
(202) 326-6010

*Counsel of Record

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TROY KING
Attorney General of Alabama
State House
11 South Union Street
Montgomery, AL 36130

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
1305 East Walnut, 2nd Floor
Des Moines, IA 50319

G. STEVEN ROWE
Attorney General of Maine
State House Station Six
Augusta, ME 04333

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
P.O. Box 899
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620

BRIAN SANDOVAL
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

KELLY A. AYOTTE
Attorney General of
New Hampshire
33 Capitol Street
Concord, NH 03301

ELIOT SPITZER
Attorney General of New York
120 Broadway
New York, NY 10271

WAYNE STENEHJEM
Attorney General of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

JIM PETRO
Attorney General of Ohio
150 East Gay Street
23rd Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105

HARDY MYERS
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

LAWRENCE E. LONG
Attorney General of South Dakota
500 East Capitol Ave.
Pierre, SD 57501

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114

DARRELL V. MCGRAW, JR.
Attorney General of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

QUESTION PRESENTED

Whether the $100 fee imposed by Michigan upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

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INTEREST OF THE AMICI CURIAE

The 21 *amici* States submit this brief in support of the Respondents, the Michigan Public Service Commission, *et al.*, to urge affirmance of the judgment of the Michigan Court of Appeals that Michigan's $100 annual flat fee on vehicles that make intrastate deliveries does not violate the dormant Commerce Clause. The States have a compelling interest in this case because the position of the Petitioners, the American Trucking Associations, Inc. and USF Holland, Inc. (hereafter, "ATA"), threatens the States' ability to levy taxes and fees on commercial activities that take place within their borders. The decision here will undoubtedly impact this important component of the States' sovereign powers.

SUMMARY OF ARGUMENT

The core concerns of the dormant Commerce Clause are not implicated by Michigan's flat fee on intrastate trucking. The fee does not facially discriminate against out-of-state or interstate entities; there is no discriminatory or protectionist intent; and the fee does not impose extraterritorial pricing or regulation. ATA's argument, therefore, comes down to the propositions that (1) Michigan's flat fee fails the internal consistency test (as ATA describes the test) because if all States imposed an identical fee, it would burden multi-state companies more than local companies; and (2) Michigan's flat fee discriminates against interstate commerce because multi-state trucking companies use Michigan roads less than local trucking companies and therefore pay the fee at a higher effective rate. Neither argument withstands scrutiny.

I. ATA's math, at least, is correct: If every State imposed the same fee as Michigan, a company conducting intrastate operations in all 48 contiguous States would pay $4800 in fees, while a company conducting such operations in only one State would pay $100. See ATA Br. 14. A central issue in this case is whether

Michigan's fee—and possibly numerous other flat fees and taxes imposed on both interstate and intrastate activities—are unconstitutional for that reason alone. The answer is no.

The premise of ATA's version of the internal consistency test is that the Constitution protects companies that operate in multiple States from having to bear burdens not borne by companies that operate in only one State. That premise is irreconcilable with our federalist system, which embraces the power of States to adopt diverse laws. A host of state regulations—including safety laws, labeling laws, and reporting requirements—burden companies that operate in multiple States more than companies that operate in only one State. Our Federalism would be turned upside down if every state law having that effect were deemed unconstitutional.

Nor does ATA's theory find any support in general dormant Commerce Clause principles and doctrine. State regulations violate the dormant Commerce Clause when they discriminate against interstate commerce on their face or impose burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Neither rule invalidates state laws merely for having the commonplace effect of burdening multi-state companies more than one-state companies.

This Court's jurisprudence regarding the dormant Commerce Clause's application to state taxes likewise does not invalidate state taxes having that effect. The Court has expressly recognized that companies conducting business in multiple States may be subjected to multiple taxes, so long as each State taxes its fair share of the transactions. ATA's version of the internal consistency test does not advance that fair apportionment concern because it insulates multi-state companies from paying taxes on activities that no other State could tax (such as the privilege of doing business in a particular State). ATA's expansive and unprecedented theory renders vulnerable numerous types of state taxes and fees of longstanding pedigree.

ATA asserts that in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), this Court adopted its version of the internal consistency test. Not so. The Court invalidated the Pennsylvania flat taxes at issue in *Scheiner* because they imposed much higher effective tax rates on out-of-state companies than on local companies and erected a barrier around the State, deterring vehicles from entering. The Court did not hold (even as to taxes on interstate activities) that the Constitution protects companies that operate in multiple States from having to bear tax burdens not borne by companies that operate in only one State. Nor has the Court used the internal consistency test in any other case to "protect" multi-state companies from such taxation.

II. ATA seeks to extend *Scheiner* to fees imposed on intrastate activities. Even if this Court accepts ATA's reading of *Scheiner*, it should not take that additional step. In contrast to the Pennsylvania taxes at issue in *Scheiner*, fees imposed on point-to-point deliveries within a State are not barriers to entry into the State. Moreover, States and local governments impose flat license and other fees on countless intrastate business operations, from operating a taxicab to owning a restaurant to running a laundromat. There is no reason why a company seeking to engage in one of those businesses in more than one State should not pay a fee in each State in which it operates. Abundant and well-established case law supports that proposition.

III. Michigan's flat fee on intrastate trucking operations satisfies the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Only two of the four prongs of *Complete Auto* are at issue here: fair apportionment and discrimination. Michigan's

fee raises no fair apportionment concerns because it is imposed on an intrastate activity to fund intrastate regulatory measures. The fair apportionment objective of "ensur[ing] that each State taxes only its fair share of an interstate transaction," *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), is not implicated here. As to discrimination, Michigan's fee does not discriminate on its face and ATA has failed to present any evidence that it discriminates in effect. Michigan's fee, therefore, is valid under the Commerce Clause.[1]

ARGUMENT

MICHIGAN'S FLAT FEE ON TRUCKS CONDUCTING INTRASTATE OPERATIONS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

ATA writes as though its position is merely a straightforward application of well-established doctrine. According to ATA, the Court in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), held that all flat taxes imposed on interstate activities violate the dormant Commerce Clause because, if every State imposed the same tax, companies that operate in multiple States will bear tax burdens not borne by companies that operate in only one State. ATA Br. 14. ATA then asks the Court to apply that rule to flat fees on intrastate activities. Things are not quite that simple.

The rule ATA believes (incorrectly) that *Scheiner* adopted with respect to interstate activities conflicts with fundamental principles of federalism and has no basis in this Court's Commerce Clause jurisprudence. And even assuming, *arguendo*, that *Scheiner* did

[1] Michigan's brief urges affirmance on several other grounds, which, for the sake of brevity, are not repeated herein. This brief assumes, *arguendo*, that Michigan's fee is subject to the *Complete Auto* test and that Michigan is administratively capable of apportioning its fee by mileage or another appropriate proxy.

adopt that rule, extending it to flat taxes on intrastate transactions would mark a dramatic departure from traditional taxing practices and would conflict with longstanding precedent. When Michigan's flat fee is analyzed under traditional fair apportionment and discrimination principles, it readily passes constitutional muster.

I. The Dormant Commerce Clause Does Not Proscribe All State Taxes That, If Applied By Every State, Would Burden Multi-State Companies More Than One-State Companies.

ATA contends that Michigan's fee is unconstitutional because, if every State imposed an identical fee, a company making intrastate deliveries in 48 States would pay $4800, while a company operating in only one State would pay $100. Why does that (hypothetical) cumulative burden violate the Commerce Clause? Relying on *Scheiner*, ATA asserts that "[t]he reason is obvious: unapportioned levies necessarily impose burdens on interstate commerce that are not borne by equivalent intrastate activity." ATA Br. 14. That begs the question, however. Why *shouldn't* companies that operate in multiple States (hereafter, "multi-state companies") bear burdens not borne by companies that operate in just one State (hereafter, "one-state companies")?

ATA separately argues that Michigan's flat fee is systemically biased against multi-state trucking companies because, on average, they use Michigan roads less for the purpose of conducting intrastate operations than do local trucking companies. ATA Br. 19-21. We respond to the allegation in §III, *infra*. What matters at present is that a finding of systemic bias against multi-state companies is not a predicate to application of ATA's $4800-versus-$100 test. Rather, ATA's test is premised on the view that the dormant Commerce Clause shields multi-state companies from state measures, whether viewed in isolation or in combination with other States' measures, that incidentally burden them more than

one-state companies. That premise is untenable, even as applied to taxes on interstate activities.

ATA's $4800-versus-$100 rule conflicts with the underpinnings of Our Federalism, general dormant Commerce Clause principles, and the Court's state-tax Commerce Clause jurisprudence. Subsections (A) and (B), *infra*, illustrate this by focusing on state regulations. Although state regulations affect multi-state companies in somewhat different ways than state taxes—for example, *inconsistent* state regulations often burden multi-state companies, while the internal consistency test hypothesizes *uniform* state taxes—examining the States' authority to regulate is still instructive, for it illustrates the extent to which ATA's internal consistency test departs from core constitutional precepts. Subsections (C) to (E), *infra*, return the focus to state taxes and demonstrate that ATA's proposed rule would depart from existing state-tax jurisprudence and would call into question the validity of numerous other state taxes. For these reasons, the Court should reject that rule.

A. Our Federalism embraces state laws that have the incidental effect of burdening multi-state companies more than one-state companies.

In his landmark opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824), Chief Justice Marshall suggested a "dual federalism" model of American government under which the state and federal governments each possessed distinct, mutually exclusive fields of power. Under that model, "the Constitution's textual grant of power to Congress would simultaneously deprive the states of any power to regulate interstate commerce." Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and The Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 584 (1987). Dual federalism long ago ceased to be an "accepted theory of American federalism." *Id.* State power to enact measures affecting interstate commerce is now so well accepted that

"[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

The States' power to enact regulations and rules affecting interstate commerce inevitably imposes burdens on multi-state companies that are not imposed on one-state companies. To take an obvious example, if States adopted varying laws governing how a product must be labeled, the costs of manufacturing and distributing the product across the country would necessarily rise. These added costs would not be borne by a company that manufactured and distributed the product solely within one State. Countless other state laws—including common-law tort rules, common-law contract rules, health and safety regulations, and reporting requirements—have a similar consequence. It is beyond cavil, or should be at this point in our Nation's history, that the Constitution does not proscribe state and local laws merely for having that effect.

Many a multi-state company would prefer to deal with one, national set of rules and regulations than with 50 sets of rules and regulations. Yet, while this Court has pronounced the importance of having a "national market," *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994), it has never demanded complete national uniformity in commercial regulation. And rightly so. The Framers of our Constitution did not intend to create a purely national marketplace in which commercial entities do not have to worry about the economic consequences of choosing to engage in business in multiple States. As Professor Regan explained:

> Talk of economic nationhood and of a national common market tends to suggest that there is a national interest in uniformity of commercial regulation. But there is no such interest.... The reason for having separate states is to allow diversity—diversity

> of commercial regulation as much as diversity in other spheres. Of course, diversity has its costs, and Congress exists in part to see that the costs of diversity do not become intolerable. But the most fundamental features of our polity are inconsistent with the idea that we value uniformity of state regulation just for the sake of uniformity.

Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1177 (1986).

As it is, Our Federalism includes autonomous sovereign States entitled to enact diverse laws that serve the needs and interests of their citizenry and raise necessary revenues. See *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) ("the entire country is made up of a Union of separate state governments, and . . . the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"). Whether or not having States "perform their separate functions in their separate ways" is the most efficient form of government, it is, without question, *our* form of government.

B. General dormant Commerce Clause jurisprudence does not proscribe state regulations whenever they incidentally burden multi-state companies more than one-state companies.

The regulatory and taxing power of the sovereign States is not unlimited, of course, and the dormant Commerce Clause imposes necessary and proper limits thereupon. Those limits are fully consonant with the federalism principles discussed above. The core concern of the Commerce Clause's negative aspect is "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oklahoma Tax Comm'n v. Jefferson*

Lines, Inc., 514 U.S. 175, 180 (1995). Current doctrine accomplishes that objective, with respect to state regulatory measures, through (1) a virtually *per se* rule against state laws that discriminate against interstate commerce, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997), and (2) a prohibition against state laws where "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Neither rule, as elucidated and refined in this Court's decisions, invalidates state laws merely for having the effect of burdening multi-state companies more than one-state companies.

Discrimination. This Court has rejected the notion that a state law discriminates within the meaning of the dormant Commerce Clause whenever the law's burden happens to fall principally on some multi-state companies. Rather, such concerns are properly analyzed under the *Pike* balancing test. For instance, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court rejected a dormant Commerce Clause challenge to a Minnesota law banning the retail sale of milk in plastic, non-returnable containers. The Court found that "Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly.' . . . This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down." 449 U.S. at 471-72. Later in the opinion, the Court addressed the contention that "the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry," but did so under the *Pike* balancing test. *Id.* at 473-74.

Likewise, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Court upheld an Indiana statute that made it more difficult for hostile takeovers of Indiana corporations to succeed. The Court rejected respondent's claim that the statute "is

discriminatory because it will apply most often to out-of-state entities." 481 U.S. at 88.

> "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978); . . . . Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

Id. As in *Clover Leaf Creamery*, the Court then assessed the statute under the *Pike* balancing test.

Clearly excessive burden. In *Pike* itself, the Court held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. The import of the test is plain on its face: a non-discriminatory state regulation burdening interstate commerce is ordinarily constitutional; only when that burden is "clearly excessive" will it violate the dormant Commerce Clause.

In practice, the *Pike* balancing test does not often invalidate state laws. *Clover Leaf* and *CTS Corp.*, discussed above, are just two of many instances in which this Court rejected a dormant Commerce Clause claim based on the *Pike* test. As Professor Tribe has observed, "[w]hen the Court has . . . applied its balancing test, weighing the burden on interstate commerce against the benefit to the state's legitimate interests, it has most often upheld the statute as one whose benefits outweigh its burdens." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §6-6, at 1062 (3d ed. 2000).

The result could not be otherwise. If an added burden on multi-state companies (greater than that borne by one-state companies) were enough to invalidate a state law under the dormant Commerce Clause, the preemption provisions of the Employee Retirement Income Security Act, 29 U.S.C. §1132(a), the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136v(b), and many other federal statutes would have been unnecessary because they were designed in large measure to replace diverse state laws with uniform national standards. Congress needed to intervene in these areas precisely because the dormant Commerce Clause did not bar the States' prior set of laws, which inevitably burdened multi-state companies more than one-state companies.

C. ATA's version of the internal consistency test finds no support in this Court's jurisprudence governing the dormant Commerce Clause's application to state taxes.

1. If (as we are assuming, *arguendo*) the Court concludes that Michigan's fee is a tax, then the argument above does not, of its own force, dispose of the question presented in this case. Because of the complexity of state tax codes and the complex ways by which companies are affected by multiple States' taxes, this Court has imposed various limits on state taxation that do not apply to state regulations. See generally Tribe, *supra*, §6-15, at 1105-06. The four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), for assessing whether state taxes violate the dormant Commerce Clause does not, therefore, duplicate the discrimination and clearly excessive burden inquiries applicable to state regulations.

Nevertheless, the federalism principles discussed above apply with full force to state taxes. And the broad objective of the dormant Commerce Clause—avoiding economic Balkanization—is no different when state taxes are being considered. Cf. *Jefferson*

Lines, 514 U.S. at 179-80 (reciting general dormant Commerce Clause principles and then reviewing how the Court has applied those principles to state taxes). Accordingly, although multi-state companies cannot be taxed at higher rates than one-state companies and cannot be taxed on more than 100% of their net income, they can be forced to accept the inevitable consequence of operating in more than one State—having to bear the burden of complying with more than one State's laws, including tax laws.

The Court reaffirmed that fundamental principle in *Jefferson Lines*, when a bus service complained that it might have to pay a sales tax on tickets it had sold in Oklahoma for bus travel from Oklahoma to other States as well as, perhaps, a gross receipts tax levied by Texas on the Texas portion of a bus trip. Rejecting that argument, the Court stated:

> The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the "accidental incident of interstate commerce being subject to two different taxing jurisdictions."

514 U.S. at 192 (quoting William-B. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 75 (1943), and citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277 (1978)).

2. This does not mean, of course, that *all* forms of multiple taxation are constitutional. The Court's "fair apportionment" jurisprudence—the second prong of *Complete Auto*—is designed to distinguish valid types of multiple taxation from invalid ones. Fair apportionment works hand-in-hand with *Complete Auto*'s substantial nexus prong "to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). The paradigmatic fair apportionment concern

is when taxation by more than one State results in an entity being taxed cumulatively on more than 100% of its net income. See *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). This concern with taxation by more than one State on the entirety of the same tax base prompted the Court to adopt its fair apportionment rule, which guards against that contingency (typically referred to as "multiple taxation"). *Jefferson Lines*, 514 U.S. at 184-85.

ATA's version of the internal consistency test does not advance the interest in fairly apportioning how a particular activity, or a company's net income, is taxed by multiple States. ATA's test instead guards multi-state companies against having to pay a tax in each State for activities that no other State could tax (such as the privilege of doing business in a particular State). Such taxes do not raise any apportionment concerns, *i.e.*, "ensur[ing] that each State taxes only its fair share of an interstate transaction," *Goldberg*, 488 U.S. at 260-61. Rather than ensuring that a State does not tax more than its fair share of an interstate activity, ATA's test insulates multi-state companies from paying taxes to which they are properly subject. This protection of multi-state companies from taxes imposed by the multiple States in which they operate is wholly disconnected from any genuine dormant Commerce Clause objective.

D. Practical consequences also counsel against ATA's version of the internal consistency test.

The consequence of applying ATA's internal consistency test would be to render numerous types of state taxes and fees, which have been enforced for years, vulnerable to constitutional challenge. That alone is cause to doubt whether the test reflects a proper construction of the dormant Commerce Clause. Cf. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)

("[The] matter . . . is disposed of . . . , on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax . . . . Upon this point a page of history is worth a volume of logic.").

ATA is not shy about the consequences of its position. It approvingly quotes Professor Hellerstein's opinion that "the imposition of *any* unapportioned flat state or local tax on a multistate business would appear to be vulnerable to attack under the 'internal consistency' doctrine." ATA Br. 15 (quoting Walter Hellerstein, *Is 'Internal Consistency' Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation*, 87 Mich. L. Rev. 138, 153-54 (1988)). Rather than serving as reason to mechanically invalidate Michigan's flat fee on intrastate commerce, this possible consequence of ATA's version of the internal consistency test counsels in favor of rejecting it.

Indeed, Professor Hellerstein himself observed that a broad application of the internal consistency test would have a great "impact on existing state tax structures," and that the implications of that impact would be "rather unsettling." Hellerstein, *supra*, 87 Mich. L. Rev. at 153-54. He listed three "broad categor[ies]" of taxes and fees placed in jeopardy by the internal consistency test (as construed by ATA) because they are "unapportioned flat taxes": (1) many "initial fees and taxes on domestic and foreign corporations when first organizing or qualifying to do business in the state"; (2) many "annual business license taxes imposed by states and localities for carrying on particular trades or occupations"; and (3) many "professional and similar licensing fees," such as bar fees imposed on those wanting to practice law in a certain State. *Id.* at 154-56.

ATA, in its petition for a writ of certiorari and brief on the merits, trumpets still more types of state taxes it believes are invalid under its position. See ATA Pet. 24-26 & nn.12-13; ATA Br. 15-16 n.6. These include flat fees on transporters of hazardous waste, fuel tax registration fees, fuel-user license fees, and fees used to support no-fault insurance funds.[2]

To be sure, if ATA were to prevail in this case, the state Attorneys General would vigorously defend the various flat taxes made vulnerable by ATA's position. Let there be no doubt, though, that ATA seeks to forge a path at the end of which is the demise of numerous and multifarious state taxes, many of longstanding pedigree. This Court should decline to embark on that journey.

E. This Court's Decisions Do Not Support ATA's Interpretation Of The Internal Consistency Test.

The above discussion shows that there is no justification for a rule that a state tax violates the dormant Commerce Clause merely because, if every other State enacted the same tax, multi-state companies would be burdened more than one-state companies. ATA insists, however, that the Court has already adopted that rule with respect to taxes on interstate transactions. That is not the case.

1. The Court memorably described its dormant Commerce Clause jurisprudence as a "quagmire," *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959), and the internal consistency test is emblematic. Putting *Scheiner* to the side for the moment, the Court appears to have adopted two

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[2] ATA even succeeded in convincing the Oregon Court of Appeals to invalidate an optional flat fee that truckers can choose to pay instead of a weight-mile tax. See *American Trucking Ass'ns, Inc. v. Oregon*, 90 P.3d 15 (Or. App. Ct. 2004), *rev. allowed*, 104 P.3d 601 (Or. 2004). Although the flat fee is optional, applies only where reporting and enforcement of the weight-mile tax would be onerous, and is designed to generate the same revenues as would have been generated if flat-fee taxpayers had paid the weight-mile tax, the court struck it down under ATA's expansive reading of the internal consistency test. *Id.* at 20-23.

internal consistency tests: a fair apportionment version that helps ensure that a State is not taxing more than its fair share of a taxable transaction; and a discrimination version that helps confirm the discriminatory impact of a facially-discriminatory tax. Neither version serves as a means of ferreting out taxes that, if applied in all 50 States, would merely result in multi-state companies paying more in taxes than one-state companies.

In *Container Corp.*, the Court stated that a "component" of fair apportionment "is what might be called internal consistency —that is, the [tax] formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." 463 U.S. at 169. This was the first time the Court referenced internal consistency, but the test did not break new ground. It merely expressed the well-established fair apportionment rule prohibiting multiple taxation. See §I(C), *supra*.

In *Goldberg*, 488 U.S. at 261, and *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 379-80 (1991), the Court described the test in *Container Corp.*'s terms, *i.e.*, as a fair apportionment/multiple taxation test. The Court did so again when it most recently applied the internal consistency test, in *Jefferson Lines*, *supra*. Citing *Goldberg* and *Container Corp.*, the Court stated that "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from *the interstate transaction*." 514 U.S. at 185 (emphasis added). That phrasing envisions a discrete transaction, the taxation of which must be fairly apportioned among the States to eliminate the risk of multiple taxation.[3] The tax at issue in *Jefferson Lines*

[3] The Court cited *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 439 (1939), a classic multiple taxation case in which the Court held that a Washington gross receipts tax was not fairly apportioned because it measured its tax "by the entire volume of the interstate commerce in which appellant participates" and therefore "is not apportioned to activities within the state."

satisfied the test because "[i]f every State were to a impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax." *Id.*

Shortly after its decision in *Container Corp.*, the Court applied the internal consistency test in a different way, namely, as a method of confirming the discriminatory impact of a facially discriminatory tax. In *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), the Court addressed a West Virginia tax that discriminated on its face by exempting in-state manufacturers from a wholesaling tax imposed on selling activities in the State. The State argued that Armco must "prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia." 467 U.S. at 644. The Court held that "[t]his is not the test." *Id.* After quoting the internal consistency test as set forth in *Container Corp.*, the Court stated:

> In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce. See also *id.*, at 170-171. Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.

Id. at 644-45. In other words, a facially-discriminatory state tax cannot be saved by the possibility that other taxes will have an offsetting effect.[4]

The Court next applied the internal consistency test in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). As in *Armco*, the Court first concluded that the tax scheme at issue was facially discriminatory. 483 U.S. at 240. The Court then stated that, "[a]s we explained in *Armco*, our

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[4] Professor Hellerstein has observed that the West Virginia tax scheme at issue in *Armco* failed the internal consistency test because if all 50 States adopted West Virginia's scheme, a "wholly intrastate manufacturer/wholesaler would pay a tax only on its manufacturing activity" while "the enterprise that manufactured in one state and wholesaled in another would pay a manufacturing tax to the state of manufacture and a wholesaling tax to the state of sale." Hellerstein, *supra*, 87 Mich. L. Rev. at 142. It would be a serious mistake to extrapolate from that observation a general rule that the internal consistency test invalidates *any* state tax that, if adopted by all 50 States, would impose burdens on multi-state companies not borne by one-state companies. Beyond the fact that the Court in *Armco* did not purport to establish such a rule, it also misconstrues the constitutional problem with West Virginia's tax.

West Virginia taxed two discrete activities (tax bases), but relieved in-state manufacturers from one of those taxes. If every State adopted that tax scheme, companies that performed both activities in one State would be taxed on only one activity (wholesaling), whereas companies that operated in two States would pay taxes on both tax bases. This result discriminated against multi-state companies, which were taxed more than one-state companies on a particular tax base applicable to them both. By contrast, there is nothing discriminatory about a one-state company paying taxes with respect to one tax base (*e.g.*, retailing in the State), a two-state company paying taxes on two tax bases (*e.g.*, retailing in States A and B), a three-state company paying taxes on three tax bases (*e.g.*, retailing in States A, B, and C), and so on. A multi-state company is not discriminated against when it must pay taxes on additional tax bases because it engages in additional, taxed activities. The Court made precisely this point in the passage from *Jefferson Lines* quoted, *supra*, at 12.

conclusion that a tax facially discriminates against interstate commerce need not be confirmed by an examination of the tax burdens imposed by other States." *Id.* at 247. The Court then quoted the portion of *Armco* quoted above, without modifying the internal consistency test in any way. *Id.*

Thus, there appear to be two general internal consistency tests: the *Container Corp.* fair apportionment version and the *Armco* discrimination version. Neither version of the test would invalidate a non-discriminatory state tax imposed on a discrete activity that only one State could tax (such as the privilege of conducting business in a particular State). Nor does either version invalidate all state taxes that, if applied by every State, would result in multi-state companies being cumulatively taxed more than one-state companies. A facially-neutral tax whose structure ensures that a company will not be taxed on more than 100% of the taxed activity passes both versions of the internal consistency test.

2. *Scheiner*, decided the same day as *Tyler Pipe*, is the case upon which ATA principally relies. See ATA Br. 13-14. *Scheiner* addressed two Pennsylvania flat taxes on trucks engaged in interstate commerce, which were part of a complicated tax regime that varied over the years. The Court found two constitutional flaws with the taxes. First, the Court concluded that the taxes discriminated against out-of-state trucking companies. The State offset the flat taxes imposed on local truckers, but not out-of-state truckers, by reducing certain other fees paid only by local truckers, *Scheiner*, 483 U.S. at 273-75; and the taxes "impose[d] a cost per mile on [multi-state trucks] that is approximately five times as heavy as the cost per mile borne by local trucks," *id.* at 286.

Viewed this way, the Court's holding that Pennsylvania's flat tax failed the internal consistency test, *id.* at 284, can be seen as an application of the *Armco* anti-discrimination version of the test. The one paragraph in *Scheiner* addressing internal consistency did not

purport to modify or expand the test, and the only case it cited was *Armco* itself. *Id.* Just one Term later, in *United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989), the Court described *Scheiner* in just this fashion:

> The flat taxes [in *Scheiner*] were objectionable because, even though they were facially neutral, their effect was to subject out-of-state vehicles, which traveled on average much fewer miles inside Pennsylvania than did in-state vehicles, to a much higher charge per mile traveled. The taxes failed what we have described as the "internal consistency" requirement of the Commerce Clause. [483 U.S.] at 282-287; see also *Tyler Pipe Industries*, [*supra*].

Second, the Court faulted the flat taxes for "placing a financial barrier around the State of Pennsylvania." *Scheiner*, 483 U.S. at 284. The Court's obvious concern was that the taxes penalized interstate commercial travel by taxing "the privilege of making commercial entrances into its territory." *Id.* By imposing the tax on all commercial entries into the State, including by trucks that did not even stop in the State (*e.g.*, trucks making shipments from New Jersey to Ohio via Pennsylvania), Pennsylvania was disrupting the flow of interstate commerce. That disruption would only be magnified if every State imposed a similar tax.

Addressing that concern does not require a rule that the dormant Commerce Clause proscribes all flat taxes or all taxes that, if adopted by all 50 States, would burden multi-state companies more than one-state companies. The Court did not remotely suggest it was adopting any such rule, and no such rule was needed to invalidate the taxes at issue. A non-discriminatory tax imposed on a discrete event does not "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure." *Id.* at 286. ATA's expansive version of the internal consistency test unmoors the test from its twin purposes of

barring multiple taxation and facially discriminatory taxes, and was not adopted in *Scheiner*.

Nor, finally, do the "drummer" cases cited by ATA (Br. 17-19) suggest that flat taxes on interstate transactions are unconstitutional. In those cases, the Court struck down flat taxes imposed by cities on salespeople who traveled for a company and used samples to solicit orders from customers for goods to be delivered to them at a later time. See *Nippert v. City of Richmond*, 327 U.S. 416 (1946); *Robbins v. Taxing Dist. of Shelby County*, 120 U.S. 489 (1887). *Robbins* rested on two grounds: the now-discredited view that "no regulations can be made [by States] directly affecting interstate commerce," 120 U.S. at 494, and the recognition that the tax was designed by local powers to discriminate against interstate commerce because only out-of-state companies needed to employ "drummers" to sell their goods, given that local companies could sell their wares to customers from local stores, *id.* at 498.

Nippert also emphasized the discriminatory nature and presumed discriminatory intent of the tax at issue. 327 U.S. at 429-34. And the *Nippert* Court found, after observing that "not all burdens on commerce, but only undue or discriminatory ones, are forbidden," *id.* at 425, that "the tax [was] not only burdensome but prohibitive," *id.* at 429. That reasoning is a far cry from ATA's broad position that the dormant Commerce Clause invalidates any state tax that has the effect of burdening multi-state companies more than one-state companies.

II. *Scheiner* Should Not Be Extended To Invalidate Flat Fees On Intrastate Commerce.

Whether or not *Scheiner* adopted ATA's version of the internal consistency test, its holding should not be extended to exactions on intrastate activities. The Court in *Scheiner* responded to special

concerns not presented by fees on intrastate activities, which are commonplace and (until now) of unquestioned validity; and ample precedent supports their constitutionality.

1. ATA is correct that the Commerce Clause no longer places a firewall between interstate activities (which the States could not tax) and intrastate activities (which the States could tax). ATA Br. 35-36. That does not mean, however, that the distinction between interstate and intrastate activities is irrelevant for all dormant Commerce Clause purposes. Indeed, drawing a line between those two types of activities makes perfect sense in terms of the objectives the dormant Commerce Clause is intended to serve.[5]

As discussed above, motivating the Court in *Scheiner* was the concern that Pennsylvania's flat taxes on the commercial use of its roads penalized interstate travel and stood as a barrier to entry into the State. See 483 U.S. at 284 (the tax's "inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. . . . If each State imposed flat taxes for the privileges of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."). A flat fee on an intrastate business transaction, such as Michigan's fee, does not raise that specter.

Commercial carriers are free to come and go into Michigan (or any other State that imposed a like fee) as they please. Trucks are

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[5] The line drawn above between interstate activities and intrastate activities conducted by multi-state companies is *not* the same as the line between activities that Congress may regulate under the Commerce Clause and activities that it may not. See generally *United States v. Lopez*, 514 U.S. 549 (1995). We are not suggesting that the regulation of intrastate trucking operations is outside of Congress's Commerce Clause powers. But just because the interstate trucking/intrastate trucking distinction may not determine Congress' power does not mean it is irrelevant to the dormant Commerce Clause inquiry.

not taxed upon the mere entrance into the State and they are not deterred from driving through the State. Only if the trucks deliver goods between two points within Michigan would they have to pay a fee. Such a fee, however, is no different than myriad other fees that States and local government routinely impose on local businesses to help defray the costs of regulating them.

For example, §4-5-010 of the Municipal Code of the City of Chicago lists 50 types of businesses that must pay annual (mostly flat) license fees. Among the covered businesses are ambulance operators, pet shops, day care centers, general contractors, retail food establishments, laundries, retail liquor stores, body piercing shops, and tobacco dealers. Companies that operate in more than one State undoubtedly engage in many of those business and are subject to the fees. ATA's $4800-versus-$100 rule would hold every single one of these fees—and the many thousands of similar fees imposed across the country—unconstitutional (or at least presumptively unconstitutional, pending a showing by the taxing entity that it is administratively impossible to apportion the taxes in any other way). That is certainly not the law today, and should not become the law through a decision by this Court.

The Commerce Clause's purpose is to protect interstate commerce by preventing the States from enacting protectionist laws that would disrupt the flow of interstate activities and lead to economic Balkanization. *Jefferson Lines*, 514 U.S. at 180. The Clause is not designed to stop States and cities from exercising their basic power to tax and regulate those—be they multi-state or one-state companies—engaging in intrastate commerce.

2. Ample precedent supports the States' authority to impose flat taxes on intrastate activities. A long line of cases starting with *Osborne v. Florida*, 164 U.S. 650, 655-56 (1897), expressly recognizes the right of States to impose flat taxes on intrastate activities engaged in by transportation companies and other

businesses. For example, in *Osborne*, the Court upheld a flat license tax on express companies as applied to companies undertaking both intrastate and interstate deliveries on the ground that the State could tax the intrastate activity. 164 U.S. at 653-54. Similarly, in *Bode v. Barrett*, 344 U.S. 583, 585 (1953), the Court upheld a flat tax on all vehicles using Illinois' highways on the theory that "each of the interstate carriers does an intrastate business as well," and "[n]o effort is made to show that . . . the tax is increased by reason of the interstate operations of any appellant."[6]

The most recent drummer case, *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), reached the same conclusion. In *Dunbar-Stanley*, the Court upheld an Alabama tax of $5 per week on each "transient or traveling photographer." The tax was challenged by a North Carolina photography company that took pictures at J.C. Penney stores in Alabama, developed the pictures in North Carolina, and then sent them to the Penney stores for delivery to the customers. 393 U.S. at 538-39. Relying on the *Nippert* line of cases, the company asserted that the Commere Clause prohibited the tax. This Court unanimously rejected that claim. The "issue," held the Court, "is whether the local activity which is made the nominal subject of the tax is such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Id.* at 540 (internal citation and quotation marks omitted). Whereas the solicitation of orders within a state is essential to certain interstate commerce, the photographing

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[6] See also *City of Chicago v. Willett Co.*, 344 U.S. 574, 576-79 (1953); *Browning v. City of Waycross*, 233 U.S. 16, 22-23 (1914); *Armour Packing Co. v. Lacy*, 200 U.S. 226, 234 (1906); *Kehrer v. Stewart*, 197 U.S. 60, 67-68 (1905); *Pennsylvania R.R. Co. v. Knight*, 192 U.S. 21, 26-27 (1904); *Allen v. Pullman's Palace Car Co.*, 191 U.S. 171, 180-81 (1903); *Pullman Co. v. Adams*, 189 U.S. 420, 422 (1903).

of children in department stores "is an essentially local activity: the business of providing photographers' services." *Id.* at 541.

We do not doubt that those decisions were based in part on the pre-*Complete Auto* approach to state taxing authority. But they were also grounded on the understanding that the sovereign States and their political subdivisions are empowered to tax local activities and have substantial leeway in structuring those taxes—including using flat taxes. That tradition, which is fully in keeping with widely-accepted federalism principles and the objectives of the dormant Commerce Clause, deserves this Court's continued respect.

III. Michigan's Flat Fee Is Fairly Apportioned And Does Not Discriminate Against Interstate Commerce.

The parties do not dispute that multi-state trucking companies making deliveries between points within Michigan have a sufficient nexus with Michigan. Nor do they dispute that Michigan's $100 fee is fairly related to services Michigan provides to the companies. The question left is whether the fee satisfies the two remaining *Complete Auto* prongs, fair apportionment and nondiscrimination. Michigan's $100 annual fee does.

Fair Apportionment. As discussed in §I(C), *supra*, the fair apportionment inquiry is designed "to ensure that each State taxes only its fair share of an interstate transaction," *Goldberg*, 488 U.S. at 260-61, and to prevent States from cumulatively taxing more than 100% of an entity's net income. Michigan's fee does not pose a risk of either problem because there is no interstate transaction to apportion here. The entire activity being taxed occurs within Michigan and the trucks are properly taxed on 100% of that intrastate activity. No other State could subject ATA to a similar fee for making intrastate Michigan deliveries.

The Commerce Clause does not require perfect apportionment, *i.e.*, a tax obligation precisely in proportion to the business transacted in the State. In *Jefferson Lines*, the taxpayer sought perfect apportionment, asserting that "unlike the telephone communication tax at issue in *Goldberg*, Oklahoma could feasibly apportion its sales tax on the basis of mileage." 514 U.S. at 195. The Court rejected that argument:

> [A]lthough we agree that no comparable barriers exist here, we nonetheless reject the idea that a particular apportionment formula must be used simply because it would be possible to use it. We have never required that any particular apportionment formula or method be used, and when a State has chosen one, an objecting taxpayer has the burden to demonstrate by "'clear and cogent evidence,'" that "'the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result.'" *Container Corp.*, 463 U.S., at 170, quoting *Moorman Mfg. Co.*, 437 U.S., at 274 (internal quotation marks omitted; citations omitted).

Id.

Even if Michigan is technologically and administratively capable of apportioning its fee for intrastate trucking operations based on mileage (or some other appropriate proxy), the Constitution does not require it to undertake that laborious burden. Flat fees serve the major tax objectives of being not only easy to administer, but easy for taxpayers to comply with. See Michael J. Graetz & Deborah H. Schenk, FEDERAL INCOME TAXATION–PRINCIPLES AND POLICIES 30-35 (3d ed. 1995) (equity, efficiency, and simplicity are the core criteria for judging a tax system). Whether those particular policy goals are outweighed by competing policies is a matter that has been, and should continue to be, left to the States.

Discrimination. As an initial matter, ATA seems to concede that its discrimination argument rises or falls with its internal consistency argument. After stating that "[t]his case involves the second and third prongs of the *Complete Auto* standard, the requirements of apportionment and nondiscrimination," it continues: "Satisfaction of these requirements, in turn, may be determined by application of what the Court has termed the 'internal consistency test.'" ATA Br. 12. Because the internal consistency test does not bar Michigan's fee (for the reasons set forth in §§ I and II, *supra*), ATA's discrimination argument fails as well.

ATA's more particularized discrimination argument (Br. 19-21) fares no better, even if it has independent force. ATA asserts that Michigan's fee discriminates against interstate commerce because "[o]n average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intra- and interstate." *Id.* at 20. ATA does not suggest that empirical evidence supports this assertion. Just the opposite. Because, in its view, the tax is discriminatory by its very nature, it has no burden of "show[ing] an actual adverse effect on interstate commerce." *Id.* at 29.

That argument is circular. ATA assumes the tax is discriminatory and then asserts that "'[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." ATA Br. 28-29 (quoting *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 343 (1992)). With the exception of *Scheiner* and *Nippert*, all the cases cited in support of that proposition involved statutes that discriminated *on their face*. See *Camps Newfound*, 520 U.S. at 575-76 ("It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce."); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996) ("There is no doubt that the

intangibles tax facially discriminates against interstate commerce."); *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("The surcharge subjects waste from other States to a fee almost three times greater than the . . . charge imposed on solid in-state waste."); *Chemical Waste Mgmt.*, 504 U.S. at 336 (addressing Alabama hazardous waste fee that did not apply to waste having a source in Alabama); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984) (addressing excise tax that exempted certain locally produced liquor). Michigan's flat fee on intrastate commerce, by contrast, does *not* discriminate against interstate commerce on its face. The same $100 charge is levied on all carriers.

Neither *Scheiner* nor *Nippert*, the other two cases relied on by ATA, supports its "because the tax is discriminatory we don't have to prove it's discriminatory" argument. In *Scheiner*, the Court had before it record evidence that "[o]n the average, the Pennsylvania-based vehicles subject to the flat taxes travel about five times as many miles on Pennsylvania roads as do the out-of-state vehicles; correspondingly, the cost per mile of each of the flat taxes is approximately five times as high for out-of-state vehicles as for local vehicles." 483 U.S. at 276. Such evidence of discriminatory effect is precisely what ATA says it need not present here.

Nippert is no more helpful to ATA. By the time the Court decided *Nippert*, it had years of experience assessing the validity of taxes on salesmen and was well aware of the "concrete fact[]," 327 U.S. at 431, that local companies were not similarly situated to out-of-state companies because they could sell their goods at local stores and avoid the tax, *id.* at 432. Moreover, the history of drummer taxes and local governments' creative attempts to circumvent this Court's rejection of them, suggested to the Court that discrimination against out-of-town companies was "the object of the local commercial influences which induce their adoption." *Id.*

at 434. ATA's bald assertion that Michigan's flat fee on intrastate deliveries has the same effect lacks that "concrete" grounding. ATA should have attempted to prove that assertion in the ordinary manner, namely, through the crucible of discovery and trial. Having failed to do so, its discrimination claim must fail.[7]

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN
Solicitor General
NADINE J. WICHERN*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2088

Of Counsel:
DAN SCHWEITZER
750 First Street, N.E.
Suite 1100
Washington, D.C. 20002
(202) 326-6010

*Counsel of Record

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[7] As Michigan argues, it is far from clear that mileage is the appropriate yardstick for gauging whether multi-state trucking companies are paying a higher effective rate, on average, than local trucking companies. Participation in safety programs funded by the fees is just one of many other possible yardsticks. Because ATA did not develop a record on the discrimination issue, there is no need for the Court to address that question. Nor is there any need for the Court do decide how much of a discriminatory effect must be shown for a state tax to run afoul of the Commerce Clause.